FILE COPY

No. 71-5255

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIE MAE BARKER, PETITIONER

v.

JOHN W. WINGO, WARDEN, KENTUCKY STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

462-109—72——1

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER, PETITIONER

v.

JOHN W. WINGO, WARDEN, KENTUCKY STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The issues raised by petitioner concern the proper interpretation of the Sixth Amendment. Since this Court's decision may thus affect federal as well as state prosecutions, the United States has an interest in this case. Our brief is addressed mainly to questions concerning the effect of a defendant's failure to demand a speedy trial, although the finding of both courts below that the delay had not impaired petitioner's ability to mount a defense may be dispositive

in this case.[1] With respect to claims based on the Sixth Amendment, our position is that where a defendant is represented by counsel during delay, his failure to demand a speedy trial should foreclose him from relying upon such delay in order to show that he has been denied the right to a speedy trial.

STATEMENT

In September 1958, the Commonwealth of Kentucky indicted petitioner for murdering a woman two

---

[1] In addition to relying on the "demand rule," the district court held that the five-year delay in this case was justified by the state's need to secure the testimony of vital witnesses, see *United States* v. *Rosson*, 441 F. 2d 242, 245–249 (C.A. 5); *United States ex rel. Von Cseh* v. *Fay*, 313 F. 2d 620, 624 (C.A. 2), and that, since petitioner had suffered no prejudice, there had been no denial of the right to a speedy trial (App. 23). The court of appeals, although focusing primarily on the period after petitioner filed his motion to dismiss, did find that none of petitioner's witnesses became unavailable during the five-year period before trial and that their testimony had not been adversely affected by this delay (App. 29).

Whether a valid justification for the delay is enough when the defendant suffers prejudice is a question that need not be determined here since petitioner's ability to defend himself had not been diminished.

In our view, there is also no need to reach the issue whether the burden of proving prejudice should shift to the government when there has been a lengthy delay. There is a conflict among the courts of appeals on this question, compare *United States* v. *DeLeo*, 422 F. 2d 487, 494 (C.A. 1), certiorari denied, 397 U.S. 1037; and *United States* v. *Alo*, 439 F. 2d 751, 755–756 (C.A. 2), certiorari denied, 404 U.S. 850, with *Pitts* v. *North Carolina*, 395 F. 2d 182, 184–185 (C.A. 4); and *Smith* v. *United States*, 418 F. 2d 1120, 1122 (C.A.D.C.), certiorari denied, 396 U.S. 936, but in this case it seems apparent that petitioner suffered no prejudice regardless of which party had the burden of proof.

months earlier (App. 4). On the same date, the Commonwealth also indicted Silas Manning, petitioner's alleged accomplice, for that murder and for the murder of the woman's husband (App. 21, 26). Manning was eventually convicted of both crimes in separate trials held in March 1962 and December 1962 (App. 21–22). During the intervening period, Manning had been tried four other times for the same offenses; the Kentucky Court of Appeals had reversed his conviction twice and his two other trials had resulted in hung juries (App. 21–22). Petitioner was not tried until October 9, 1963 (App. 22). He was convicted and sentenced to life imprisonment; the Kentucky Court of Appeals affirmed. *Barker* v. *Commonwealth*, 385 S. W. 2d 671.

From October 1958, the time originally set for petitioner's trial, until Manning's convictions had become final, the Commonwealth obtained numerous continuances on the ground that Manning's testimony was essential to the prosecution but that he was unavailable because he would invoke his privilege against self-incrimination (App. 22). Petitioner, who was represented by counsel during the entire five-year period preceding his trial and had been free on bail from June 1959, did not object to any of these postponements and at no time demanded a prompt trial (App. 25–26, 28). On February 12, 1963, however, petitioner moved for dismissal of his indictment on

the ground that he had been denied a speedy trial.[2]

In this habeas corpus action under 28 U.S.C. 2254, petitioner argues that his conviction should be vacated and his indictment dismissed because the five-year interval between indictment and trial deprived him of his Sixth Amendment right to a speedy trial.[3] The district court held that a defendant's right to a speedy trial could be waived if not asserted and that here petitioner's counsel, as a matter of strategy, did not object to the continuances and did not move for a speedy trial. The court also found that petitioner had not been prejudiced by the five-year delay since all of his witnesses were available at trial and he had not asserted that their ability to recollect had been impaired. (App. 22–23.)

The court of appeals affirmed on the basis that petitioner could not object to the delay prior to Feb-

---

[2] Both the district court (App. 20) and the court of appeals (App. 26) stated that petitioner first made such a motion on February 12, 1963; this is also the date given in the opinion of the Kentucky Court of Appeals, 385 S.W. 2d at 674. Petitioner states that he first moved to dismiss for lack of a speedy trial on February 12, 1962 (Pet. Brief, at 3, 18).

[3] Petitioner raised the same issue in the Kentucky Court of Appeals. In 1964 that court held that the speedy trial provision of the Sixth Amendment does not apply to state prosecutions (but see *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967)) and that the delay did not violate petitioner's right to a speedy trial under Section 11 of the Kentucky Constitution because (1) petitioner's failure to demand a speedy trial precluded consideration of the period before February 12, 1963; (2) the Commonwealth was justified in seeking continuances after that date since an important witness was ill; and (3) petitioner had not suffered any prejudice from the delay between February and October 1963, when his trial occurred. 385 S.W. 2d at 674.

ruary 12, 1963, because he had not demanded a speedy trial (App. 27–29) [4] and that (App. 29):

> More significantly, appellant has shown no prejudice resulting from this delay. There is no claim that during this eight-month period (or before) any witnesses became unavailable. Although appellant claims that certain defense witnesses' memories faded over the years, this assertion is not substantiated by the record. Appellant's witnesses testified with conviction and, in comparison with testimony in the earlier Manning trials, without apparent mnemonic loss. Under these circumstances, appellant is not entitled to a discharge from custody. * * *

DISCUSSION

The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *." Under the "demand rule," the accused has the obligation to seek a prompt trial. If he takes no action he cannot rely on the passage of time between charge and trial to show that he had been denied the right to a speedy trial. If he waits and demands a speedy trial after time has already elapsed, the court will consider only the period

[4] The court of appeals treated petitioner's motion for dismissal of the indictment as the equivalent to a demand for a speedy trial (App. 27 n. 1). Other courts have refused to consider such a motion as meeting the demand requirement since the remedy sought is not a trial but dismissal of the charges. See *United States* v. *Maxwell*, 383 F. 2d 437, 441 (C.A. 2), certiorari denied, 389 U.S. 1057; *Pietch* v. *United States*, 110 F. 2d 817, 819 (C.A. 10), certiorari denied, 310 U.S. 648.

after his demand in determining his Sixth Amendment claim.[5]

The origins of the "demand rule" are rather obscure. There is an obvious analogy to the English Habeas Corpus Act of 1679, 31 Charles II, c. 2, which provided for "more speedy relief" of prisoners and required that persons jailed for felony or treason be brought to trial *upon their own motion* within two terms of court or be discharged on bail. *Id.*, Section VII. Many of the states that ratified the Bill of Rights adopted the provisions of the English Act or used it as a guide in passing similar legislation. See *United States* v. *Marion*, No. 70–19, decided Dec. 20, 1971, slip op. at p. 7 n. 6; *Petition of Provoo*, 17 F.R.D. 183, 197 n. 6 (D. Md.), affirmed, 350 U.S. 857; cf. Cooley, *Constitutional Limitations* 312 n. 2 (1868).[6]

However, not all of those state laws or the laws of states later admitted to the Union expressly required affirmative action by the prisoner in order to preserve his right to a speedy trial. See, *e.g.*, *Commonwealth* v. *Sheriff & Gaoler of Allegheny County*, 16 Serg. & R. 304 (Pa. 1827) (prisoner must not assent to delay); *State* v. *Phil*, 1 Stew. 31 (Ala. 1827) (prisoner required only not to agree to postponement); but see,

[5] The "demand rule" is to be distinguished from the doctrine, sometimes invoked to bar speedy trial claims, that claims not raised at trial may not be raised on appeal. See *Peoples* v. *Hocker*, 423 F. 2d 960, 965–966 (C.A. 9); *Benson* v. *United States*, 402 F. 2d 576, 580–581 (C.A. 9); *Chapman* v. *United States*, 376 F. 2d 705 (C.A. 2).

[6] See also the exhaustive note appended to the end of the opinion in *Nixon* v. *State*, 2 Smedes & Marshall 497, 41 Am. Dec. 601, 604–607 (Miss. 1844).

e.g., Commonwealth v. *Phillips,* 16 Mass. 422, 426 (1820). Nevertheless, some state courts, even in the absence of express constitutional or statutory language to that effect, refused to grant relief unless the accused had demanded a prompt trial. See, *e.g., Stewart* v. *State,* 13 Ark. (8 Eng.) 720, 733–734 (1853):

> We cannot shut our eyes to the fact, known to all who are acquainted with the administration of justice, that where the crime is of magnitude, delays diminish the chances of conviction, and with that hope are usually sought or acquiesced in by the accused. And for that reason, we think the spirit of the law is, that for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on the record in the attitude of demanding a trial, or at least of resisting postponements.

Over the years the demand rule became firmly established in a majority of the states. As the court, after an extensive discussion of the rule, concluded in *Pines* v. *District Court,* 233 Iowa 1284, 1302, 10 N.W. 2d 574, 583 (1943), although the constitutional or statutory provisions regarding speedy trial contained no "condition that a failure to demand trial will defeat the accused's motion for discharge, yet the courts, with but few exceptions, have construed the provisions as though they contained such a condition."[7]

Early federal court decisions also followed the demand rule in cases involving the Sixth Amendment. See, *e.g., Phillips* v. *United States,* 201 Fed. 259, 262

---

[7] Note, *The Lagging Right to a Speedy Trial,* 51 Va. L. Rev. 1587, 1604 n. 87 (1965), reports that eight states have rejected the demand doctrine.

(C.A. 8); *Worthington* v. *United States*, 1 F. 2d 154 (C.A. 7), certiorari denied, 266 U.S. 626; *Daniels* v. *United States*, 17 F. 2d 339 (C.A. 9), certiorari denied, 274 U.S. 744. Today the rule prevails in all the circuits that have considered the issue.[8] See *United States* v. *Butler*, 426 F. 2d 1275, 1278 (C.A. 1); *United States* v. *DeMasi*, 445 F. 2d 251, 255–256 (C.A. 2);[9] *United States* v. *Hill*, 310 F. 2d 601, 603–604 (C.A. 4); *Bruce* v. *United States*, 351 F. 2d 318, 320 (C.A. 5), certiorari denied, 384 U.S. 921; *United States* v. *Perez*, 398 F. 2d 658, 661 (C.A. 7), certiorari denied, 393 U.S. 1080; *Bandy* v. *United States*, 408 F. 2d 518, 522 (C.A. 8); *Moser* v. *United States*, 381 F. 2d 363 (C.A. 9), certiorari denied, 389 U.S. 1054; *Pietch* v. *United States*, 110 F. 2d 817, 819 (C.A. 10), certiorari denied, 310 U.S. 648; *Smith* v. *United States*, 331 F. 2d 784 (C.A. D.C.) (*en banc*).[10]

---

[8] We have found no Third Circuit case on point. Cf. *United States* v. *Carosiello*, 439 F. 2d 942, 944 n. 4 (C.A. 3). The decision of the Sixth Circuit in the instant case serves as an example of its adherence to the rule.

[9] But see pp. 12–13 *infra*, with respect to the Second Circuit.

[10] The federal courts, however, have created exceptions to the rule in numerous circumstances:

(a) Accused unaware of pending charges or had no opportunity to make a demand, *Pitts* v. *North Carolina*, 395 F. 2d 182, 187 (C.A. 4); *Taylor* v. *United States*, 238 F. 2d 259, 261 (C.A. D.C.); *Fouts* v. *United States*, 253 F. 2d 215, 218 (C.A. 6);

(b) Accused not represented by counsel during delay, *United States* v. *Butler*, 426 F. 2d 1275, 1278 (C.A. 1), affirmed after remand, 434 F. 2d 243, certiorari denied, 401 U.S. 978; *Coleman* v. *United States*, 442 F. 2d 150, 155–156 (C.A. D.C.);

The courts that adhere to the demand doctrine have not based their rulings on an interpretation of the Sixth Amendment, but instead have generally relied on the theory that the accused's silence or inaction indicates his acquiescence in the delay. That is, by failing to demand a speedy trial or by failing to oppose prosecution motions for continuances, the accused waives his right to rely upon the elapsed time as a basis for having his indictment dismissed for lack of a speedy trial. See *United States* v. *Lustman*, 258 F. 2d 475, 478 (C.A. 2); *Pines* v. *District Court*, *supra*, 233 Iowa 1284, 10 N.W. 2d 574.[11]

The underlying premise of the rule is the "almost universal experience that delay in criminal cases is welcomed by defendants as it usually operates in their favor." *United States ex rel. Von Cseh* v. *Fay*, 313 F. 2d 620, 623 (C.A. 2). See also *Fouts* v. *United States*, 253 F. 2d 215 (C.A. 6), certiorari denied, 358 U.S. 884; *Campodonico* v. *United States*, 222 F. 2d

---

United States v. *Richardson*, 291 F. Supp. 441, 446–447 (S.D. N.Y.);

(c) Delay between arrest and indictment should not be considered because it is unreasonable to expect a defendant to demand to be indicted, *United States* v. *Colitto*, 319 F. Supp. 1077, 1082–1083 (E.D. N.Y.);

(d) Demand would not serve the interest of expediting a proper trial, *Petition of Provoo*, *supra* (charges brought in district of doubtful venue).

See generally Note, *The Right to a Speedy Trial*, 20 Stan. L. Rev. 476, 479 n. 27 (1968).

[11] See Note, *The Lagging Right to a Speedy Trial*, 51 Va. L. Rev. 1587, 1601–1610 (1965).

310, 315–316 (C.A. 9); *Stewart* v. *State*, *supra*, 13 Ark. (8 Eng.) at 733–734 (1853) ("delays diminish the chances of conviction, and with that hope are usually sought or acquiesced in by the accused"). In addition, requiring a defendant to make a demand if he wishes prompt adjudication of the charges imposes no substantial burden upon him. See, *e.g.*, *State* v. *McTague*, 173 Minn. 153, 154, 216 N.W. 787, 788. Doubtless another factor that has persuaded courts to require defendants to preserve their rights through some affirmative action is the extreme nature of the remedy for denial of a speedy trial—dismissal of the indictment with prejudice. This is reflected in the oft-quoted statement that "the right to speedy trial is not designed as a sword for the defendant's escape, but rather as a shield for his protection,"[12] which presumably means that if a defendant wishes to benefit from the right to a speedy trial he must seek a prompt trial, not simply dismissal of the indictment after substantial time has passed, particularly since he may in fact have welcomed the delay.

Although the demand rule has been criticized,[13] primarily on the ground that it conflicts with the principle that waiver of constitutional rights can be found only when there is "an intentional relinquishment or abandonment of a known right or privilege,"[14] we

---

[12] *United States* v. *Lustman*, *supra*, 258 F. 2d at 478, quoting Note, *The Right to a Speedy Criminal Trial*, 57 Colum. L. Rev. 846, 853 (1957).

[13] See *Dickey* v. *Florida*, 398 U.S. 30, 39, 49–50 (Mr. Justice Brennan, concurring); Note, *The Lagging Right to a Speedy Trial*, 51 Va. L. Rev. 1587, 1601–1605 (1965).

[14] *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

believe that the rule continues to have validity when confined to cases where the defendant was represented by counsel during the delay. See *United States* v. *Butler*, 426 F. 2d 1275 (C.A. 1), affirmed after remand, 434 F. 2d 243, certiorari denied, 401 U.S. 978.[15] Unlike the situation with respect to other constitutional rights, it may not be to the accused's advantage to invoke the right to a speedy trial since delay usually benefits the defense rather than the prosecution.[16] Of course, in some cases the defendant may later believe that the passage of time has worked against him. But the underpinning of the demand

[15] "If a defendant is without counsel it is all too likely that he will not know either that he is entitled to a speedy trial or that the failure to promptly demand the same may have serious adverse consequences. In such a situation, we think it inconsistent with recent trends concerning the waiver of constitutional rights to visit upon an accused the consequences of a late demand sought by the government. * * * Accordingly, only such pre-demand delay as occurred after defendant secured the assistance of counsel will be disregarded unless it appears that the defendant was aware of his rights and the consequences of failing to demand trial." 426 F. 2d at 1278.

[16] We are aware of no empirical studies on point, but the consistent statements of lower courts experienced in these matters attest to the validity of the proposition that defendants usually welcome delay because it operates to their advantage. See also *Dickey* v. *Florida*, 398 U.S. 30, 37–38 ("a great many accused persons seek to put off the confrontation as long as possible"); but see *id.* at 49 (Mr. Justice Brennan, concurring).

In a survey of the criminal justice system, *Newsweek* (March 8, 1971, at p. 29) reported the following statement of a public defender experienced in handling criminal cases:

"The last thing you want to do is rush to trial. You let the case ride. Everybody gets friendly. A case is continued ten or fifteen times, and nobody cares any more. The victims don't care. Everybody just wants to get rid of the case."

rule is that the accused cannot have it both ways: he cannot welcome delay and seek to gain an advantage at trial from it, and then later avoid trial entirely by having the indictment dismissed because of the delay. Instead, he must decide on one course or the other. He must either demand a speedy trial or allow the time to pass without objection.

This is not to say that long delays should be countenanced when the defendant acquiesces. Quite apart from the defense and the prosecution, the public has an interest in prompt disposition of criminal charges since "a speedy trial is necessary to preserve the means of proving the charge, to maximize the deterrent effect of prosecution and conviction, and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses." [17] From this, however, it scarcely follows that the drastic remedy of dismissing an indictment is the appropriate response to delay when the defendant has neither demanded a speedy trial nor opposed prosecution motions for continuances. In these circumstances, allowing a defendant charged with committing a crime to go free without trial would only compound the injury to the public interest.

The situation is quite different when specific rules are provided, such as those adopted by the Second Circuit, which require the prosecution to be ready for trial within six months of arrest or indictment, which-

[17] ABA, *Standards Relating to Speedy Trial* 10–11 (Approved Draft 1968).

ever is earlier.[18] Then the accused cannot expect to gain an advantage from lengthy delays and the prosecution has been put on notice that it must proceed to trial within a specific time.

But in the absence of such rules, it is proper to require defendants, with the assistance of counsel, to make a choice whether they wish a prompt trial. The objection that a defendant's remaining silent cannot be construed as an intentional relinquishment of his right to a speedy trial has no force when directed at defendants who are represented by an attorney. Defense counsel will surely know that if the defendant takes no affirmative action he cannot later seek dismissal of the charges because of the delay. That counsel's advice on this matter may seem unwise when viewed in retrospect is not a reason for dispensing with the demand requirement. The possibility of such mistakes is a common, and perhaps inevitable, risk in the administration of criminal justice. In this respect, the situation is not unlike that in *McMann* v. *Richardson,* 397 U.S. 759, 769–770, where the Court held that a defendant could not undo his plea of guilty on the ground that it had been induced by the allegedly erroneous advice of his attorney regarding the admissibility of a confession where that advice, even if mistaken in hindsight, was within the range

[18] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (adopted January 5, 1971); see also the proposed amendment to Rule 50(b) of the Federal Rules of Criminal Procedure, submitted by the Judicial Conference of the United States and now pending before this Court.

of competent representation. Like the choice to permit a defendant to testify or to assert a specific defense, the failure to demand a speedy trial may be legitimately regarded as a tactical decision binding upon the defendant that his interests would be better served by not seeking a prompt adjudication of guilt. See *Henry* v. *Mississippi*, 379 U.S. 443, 451–452; *United States ex rel. Green* v. *Rundle*, 452 F. 2d 232 (C.A. 3).

Defense counsel, through interviews with the accused, informal discussion with the prosecutor, and independent investigation, is able to learn enough about the type of proof that will be offered of his client's guilt to decide whether the passage of additional time is likely to improve or injure his client's chances at trial. Often he will have specific knowledge indicating that a particular prospective witness for the government may become unavailable through further delay, as where the witness is old, sick, resides abroad, or may flee to avoid giving testimony. Where the proof apparently will depend on conflicting versions of observed events, defense counsel may conclude that as time passes and memories dim the accused will benefit in view of the government's heavy burden of proof. Similarly, counsel may decide that his client's offense is of such relatively minor importance that the chances of a plea bargain will increase with time

as the prosecutor's office becomes occupied with more pressing business.

In the present case, it must have been evident to petitioner's counsel, if not to petitioner himself, that the Commonwealth would attempt to secure Manning's conviction before trying petitioner so that Manning could not assert the privilege against self-incrimination when called to testify against petitioner. Yet at no time over a period of years did petitioner demand a speedy trial or oppose the Commonwealth's motions for continuances, which would have compelled the prosecutor either to afford a prompt trial without the benefit of Manning's testimony or to justify further postponement against petitioner's objection. Petitioner's decision may have been based on his fear that conviction would nonetheless ensue and that the death penalty would be imposed,[19] or in the hope that the Commonwealth's efforts to obtain Manning's conviction would be unsuccessful, thereby improving petitioner's chances of a plea bargain or of acquittal. In either event, petitioner's decision not to seek a speedy trial indicates that he thought he would benefit from following this course. Such a decision is well within the range of competent counsel and, we submit, precludes petitioner from now relying on this delay as a

[19] Compare *Brady* v. *United States*, 397 U.S. 742.

basis for reversal of his conviction and dismissal of his indictment for lack of a speedy trial.[20] Accordingly, we think the result below was correct.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

---

[20] We add that with respect to any delay properly relied on by a defendant raising a speedy trial claim, we continue to adhere to the view that, in the absence of specific rules such as those adopted by the Second Circuit, the drastic step of dismissing a criminal prosecution can only be justified if the injury to the defendant outweighs the public interest in trying him for the offenses charged. In the absence of a showing of actual harm to the defendant from the delay, the balance is in favor of allowing the prosecution to proceed and of allowing a subsequent conviction to stand. For this reason, the Court has in the past emphasized the absence or presence of prejudice in determining whether the defendant was entitled to relief on his speedy trial claim. *United States* v. *Ewell*, 383 U.S. 116, 120, 122; *Dickey* v. *Florida*, 398 U.S. 30, 36–38; cf. *United States* v. *Marion*, No. 70–19, decided December 20, 1971, slip op. at 18–19. We believe the Court should continue to follow this course.

U.S. GOVERNMENT PRINTING OFFICE: 1972